

STATE OF MICHIGAN  
COURT OF APPEALS

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PORTER TOWNSHIP,

Plaintiff-Appellee,

v

ROBERT FIELDS,

Defendant-Appellant.

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UNPUBLISHED

December 19, 2006

Nos. 269193; 271251

Cass Circuit Court

LC No. 05-000306-CZ

Before: Murphy, P.J., and Smolenski and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court order granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(9) and (10). We reverse and remand. These appeals have been decided without oral argument pursuant to MCR 7.214(E).

The instant case concerns a dispute over whether defendant remains a member of the Porter Township Zoning Board of Appeals (ZBA). In 2000, the Porter Township Board (Township Board) appointed H. "Scott" Billings to serve as its representative on the ZBA. On May 25, 2004, after Billings was recalled from his position as the township supervisor, the Township Board appointed defendant, then a trustee on the Township Board, to serve on the ZBA. Plaintiff asserts that the Township Board appointed defendant to serve out the remainder of Billings' term on the ZBA and that this term ended on November 20, 2004. Defendant denies that his term is over and has refused to relinquish his seat on the ZBA. Plaintiff filed the instant suit, seeking a declaratory judgment that defendant is no longer a member of the ZBA and enjoining him from disrupting future ZBA meetings. Plaintiff filed a motion for summary disposition to which defendant failed to reply. At a hearing on this motion, the trial court found that, under MCL 125.288, defendant was appointed to fill the remainder of Billings' term. The court granted plaintiff's motion pursuant to MCR 2.116(C)(9) and (10) and awarded plaintiff costs and attorney's fees. The instant appeal followed.

The decision to grant or deny summary disposition presents a question of law that this Court reviews de novo. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). A trial court properly grants summary disposition under MCR 2.116(C)(9) where "the opposing party has failed to state a valid defense to the claim asserted against it." *In re Smith Estate*, 226 Mich App 285, 288; 574 NW2d 388 (1997). It must evaluate the motion based on the pleadings alone, accepting all well-pleaded allegations as true. *Id.* "The test is whether

the defendant's defenses are so clearly untenable as a matter of law that no factual development could possibly deny a plaintiff's right to recovery." *Id.*

In the instant case, plaintiff's complaint alleged that the Township Board appointed defendant to serve until the end of Billings' term in November of 2004. In his answer, defendant denied that the board appointed him to replace Billings, noting that three positions on the ZBA were filled at the meeting where he was appointed and that the minutes of the meeting do not specify whose position he was to fill. Based solely on the pleadings, a possibility exists that the facts could show that the Township Board appointed defendant to fill a position other than that held by Billings. Defendant's defense is not so clearly untenable that no factual development could possibly deny plaintiff's right to recovery. Thus, we find that the trial court erred in granting plaintiff's motion under MCR 2.116(C)(9).

The trial court also granted defendant's motion under MCR 2.116(C)(10). Summary disposition under this subrule is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A question of material fact exists "when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.* In deciding a motion under this rule, the trial court must consider "the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party." *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

A determination as to whether summary disposition is appropriate under MCR 2.116(C)(10) requires this Court to interpret portions of the Township Zoning Act.<sup>1</sup> The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). The first step in determining the Legislature's intent is to examine the specific language of the statute itself. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). If the statutory language is clear and unambiguous, the court must apply the statute as written, and judicial construction is neither necessary nor permitted. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

The portion of the Township Zoning Act in question provides that the board of each township exercising authority under the Act "shall appoint a township board of appeals" with 3 to 5 regular members depending on the size of the township. MCL 125.288(1). One of the regular members of this zoning board of appeals "may be a member of the township board." *Id.* The length of the terms served by members of a zoning board of appeals is set by MCL 125.288(5), which states:

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<sup>1</sup> We note that the Township Zoning Act, MCL 125.271 *et seq.*, was repealed by 2006 PA 110, effective July 1, 2006. The pertinent statute at issue here is MCL 125.288, which was included in the repealer. The current statute regarding membership on zoning boards of appeal is MCL 125.3601. However, because MCL 125.288 was effective at the time of the relevant events, it controls our analysis. See MCL 125.3702(2).

Terms shall be for 3 years, except for members serving because of their membership on the zoning board, planning commission, or township board, whose terms shall be limited to the time they are members of the zoning board, planning commission, or township board, respectively, and the period stated in the resolution appointing them. When members are first appointed, the appointments may be for less than 3 years to provide for staggered terms. A successor shall be appointed not more than 1 month after the term of the preceding member has expired. Vacancies for unexpired terms shall be filled for the remainder of the term.

Under the statute, members of a zoning board of appeals generally serve a three-year term. But an exception exists concerning the term of a member who also serves on a township board. Such a person's term is limited to (1) the time he serves on the township board, or (2) the period stated in the resolution appointing him. Here, the Township Board appointed Billings to serve as its representative on the ZBA on December 12, 2000. Based on the plain language of MCL 125.288(5), Billings' term on the ZBA expired when he lost his position as supervisor on the Township Board. This occurred before the Township Board appointed defendant to the ZBA on May 25, 2004. Because Billings' term had already expired, the trial court erred in finding that the Township Board appointed defendant to serve out the remainder of his term on the ZBA.

Defendant was a trustee on the Township Board at the time of his appointment to the ZBA. Since his appointment, defendant has been elected to continue serving on the Township Board as the township supervisor. The parties do not dispute that the Township Board appointed defendant to serve as its representative on the ZBA. Thus, under MCL 125.288(5), defendant's term on the ZBA ends when he is no longer a member of the Township Board or at the expiration of the "period stated in the resolution appointing" him to the ZBA. Because defendant remains a member of the Township Board, whether his term on the ZBA has ended depends on the period set forth in the resolution appointing him to the ZBA.

The minutes of the meeting at which the Township Board appointed defendant to the ZBA do not state the length of his term. Further, neither party has submitted a copy of the actual resolution appointing defendant to the ZBA. In support of its motion for summary disposition, plaintiff submitted a copy of the minutes of the March 8, 2005, meeting of the Township Board. These minutes show that the Township Board attempted "to correct [its] error in not assigning term ending dates to those recently appointed" to the ZBA. To accomplish this goal it provided a list of such end dates, which included a statement that defendant's term on the ZBA ended on November 20, 2004.

Based on the documentary evidence presented by plaintiff, it is apparent that the resolution appointing defendant to the ZBA failed to specify an end date for his term. Although the Township Board attempted to provide an end date at its March 8, 2005, meeting, this occurred more than nine months after it issued the resolution appointing defendant to the ZBA. The unambiguous language of MCL 125.288(5) provides that the term length of a township board's representative on a zoning board of appeals must be "stated in the resolution appointing" him. Because the Township Board did not provide an end date in the original resolution, the only factor limiting defendant's term on the ZBA is the length of his term on the Township Board.

Because the resolution appointing him to the ZBA did not state an end date, under MCL 125.288(5), the length of defendant's term on the ZBA is coextensive with that of his term on the Township Board. Further, because defendant remains a member of the Township Board, the trial court erred in granting summary disposition in favor of plaintiff and declaring that defendant's term on the ZBA ended on November 20, 2004.

"If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." MCR 2.116(I)(2); *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999). Here, no genuine issue of material fact exists and defendant is entitled to judgment as a matter of law. Consequently, we reverse the order granting plaintiff's motion for summary disposition and remand for entry of an order granting summary disposition to defendant.

In light of our ruling that the trial court erred in granting summary disposition to plaintiff, we likewise vacate the order awarding costs and fees to plaintiff. Defendant's defense was not frivolous as defined by MCL 600.2591(3)(a)(i) – (iii). Therefore, the trial court clearly erred in awarding costs and attorney fees to plaintiff as sanctions under MCR 2.625(A)(2). *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002); *In re Attorney Fees & Costs*, 233 Mich App 694, 702; 593 NW2d 589 (1999).

Reversed and remanded for entry of an order granting summary disposition in favor of defendant under MCR 2.116(I)(2) and vacating the award of costs and fees to plaintiff. We do not retain jurisdiction.

/s/ William B. Murphy  
/s/ Michael R. Smolenski  
/s/ Kirsten Frank Kelly